

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

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| Van Hyning v. Missouri River Stewards No. COPP 2016-CFP-022 | Finding of Sufficient Facts to Show a Campaign Practice Violation |
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On June 27, 2016, Dyrck Van Hyning filed a formal complaint against the Missouri River Stewards for failure to attribute campaign signs advocating a “YES” vote on Fergus County Conservation District Ordinance 2016-12 in the June 7, 2016 primary election.

Foundational Facts

The following foundational facts apply to this Decision.

Finding of Fact No. 1. The Missouri River Stewards is an organization of farm and ranch landowners formed in 1999 to promote and protect landowner interests in the Missouri Breaks Monument. (Source: Ron Poertner of Winifred, secretary of Missouri River Stewards.)

Finding of Fact No. 2. Fergus County, Montana, placed proposed Ordinance No. 2016-12 on the County ballot for a vote by electors in the June 7, 2016 primary election. The Ordinance was “for the protection of soil and water from wild, free roaming or domestic buffalo grazing in Fergus Conservation District.” (Records of Montana Secretary of State.)

Discussion

The Complaint addresses the actions of a group involved in election activity related to an issue involving the authority of a county conservation district. Accordingly, this Decision takes into consideration the exemption to campaign finance and reporting requirements set out at set out at §13-37-206, MCA.¹

Finding of Fact No. 3. There were professionally made signs advocating a “YES” vote on Ordinance No. 2016-12 that appeared in public places in Fergus County in advance of the June 7, 2016 vote. (Complaint and Response to Complaint.)

Finding of Fact No. 4. The signs were printed by Mid States Signs of Winifred, Montana. There were 36 signs printed at a cost of \$12 each for a total cost of \$436. (Commissioner’s Records.)

Finding of Fact No. 5. The signs were ordered, paid for and distributed by Missouri River Stewards. (Response of Ron Poertner on behalf of Missouri River Stewards.)

Finding of Fact No. 6. The signs had no attribution as to who paid for the signs. (COPP staff observation of language of signs and Response of Missouri River Stewards.)

The campaign reporting and disclosure exemption provided to groups involved in “special district” issues is limited to those campaign practices set out in Part 2 of Title 13, Chapter 37, MCA . The attribution requirement for election materials is set out in Chapter 35 of Title 13 and therefore does not fall within

¹ Section 13-37-206, MCA, generally exempts “special districts”, including conservation districts, from reporting and disclosure of campaign activity as follows: “[reporting and disclosure] do not apply to a...political committee organized to support or oppose an issue or a candidate if ...the committee's issue involves a unit of local government authorized by law to perform a single function or a limited number of functions, including but not limited to a conservation district...”

the exemption language of §13-37-206, MCA.² The requirement of attribution of election materials is explicit: “[a]ll election communications ... must clearly and conspicuously include the attribution ‘paid for by’ followed by the name and address of the person who made or financed the expenditure.” §13-35-225(1), MCA.

Sufficiency Finding No. 1. There are sufficient facts to show that Missouri River Stewards did not attribute as required by Montana campaign practice standards.

The Commissioner notes that campaign remediation in the form of a corrected attribution is encouraged by Montana law (§13-35-225(5), MCA). Such remediation was not possible in this Matter because the Complaint was filed after the date of the election. Further, the Commissioner appreciates and notes that the Response by Montana River Stewards included a frank recognition of the attribution error and an apology to the people of Montana.

ENFORCEMENT OF SUFFICIENCY FINDINGS

Only those reporting and disclosure activities specified in §13-37-206, MCA, are exempted from the Commissioner’s enforcement power. The Commissioner is still authorized to investigate and enforce other violations of Chapters 35 or 37 of Title 13. §13-37-111, MCA. The Commissioner therefore has authority to enforce a violation of the attribution requirement found at §13-35-225, MCA.

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner “shall

² *Mikkelsen v. Western Montana Water Users Association*, COPP-2013-CFP-15.

investigate” any alleged violation of campaign practices law. §13-37-111(2)(a), MCA. The mandate to investigate is followed by a mandate to take action as the law requires that if there is “sufficient evidence” of a violation the Commissioner must (“shall notify,” *see* §13-37-124, MCA) initiate consideration for prosecution.

Second, having been charged to make a decision, the Commissioner must follow substantive law applicable to a particular campaign practice decision. This Commissioner, having been charged to investigate and decide, hereby determines that there is sufficient evidence, as set out in this Decision, to show that above described campaign activities violated Montana’s campaign practice laws, including, but not limited to the laws set out in this Decision. Having determined that sufficient evidence of a campaign practice violation exists, the next step is to determine whether there are circumstances or explanations that may affect prosecution of the violation and/or the amount of the fine.

The failure to properly attribute cannot generally be excused by oversight or ignorance. Excusable neglect cannot be applied to oversight or ignorance of the law. *See* discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006, 009. Likewise, the Commissioner does not normally accept that failures to attribute are excused as *de minimis*. *See* discussion of *de minimis* principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006, 009.

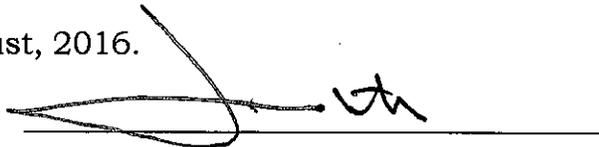
Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable to the sufficiency findings,

civil/criminal prosecution and/or a civil fine is justified. §13-37-124, MCA. The Commissioner hereby issues a “sufficient evidence” Finding and Decision justifying civil prosecution of Missouri River Stewards. Because of the nature of the violations (the failure to attribute occurred in Fergus County), this matter is referred to the County Attorney of Fergus County for his consideration as to prosecution. §13-37-124(1), MCA. Should the County Attorney waive the right to prosecute (§13-37-124(2), MCA) or fail to prosecute within 30 days (§13-37-124(1), MCA) this Matter returns to this Commissioner for possible prosecution. *Id.*

Most of the Matters decided by a Commissioner and referred to the County Attorney are waived back to the Commissioner for his further consideration. Assuming that this Matter is waived back, the Finding and Decision in this Matter does not necessarily lead to civil or criminal prosecution as the Commissioner has discretion (“may then initiate,” *See* §13-37-124(1), MCA) in regard to a legal action. Instead, most of the Matters decided by a Commissioner are resolved by payment of a negotiated fine. In setting that fine the Commissioner will consider matters affecting mitigation.

While it is expected that a fine amount will be negotiated and paid, in the event that a fine is not negotiated and the Matter resolved, the Commissioner retains statutory authority to bring a complaint in district court against any person who intentionally or negligently violates any requirement of campaign practice law, including those of §13-37-226, MCA (see §13-37-128, MCA). Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.

DATED this 23rd day of August, 2016.

A handwritten signature in black ink, appearing to read 'JM', is written over a horizontal line.

Jonathan R. Motl
Commissioner of Political Practices
Of the State of Montana
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